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# Some Thoughts on Judicial Review and Collaborative Governance

Michael Herz\*

## I. INTRODUCTION

A, perhaps the, central and never-to-be-resolved debate in American administrative law concerns this: to what extent should agencies be left to their own devices? Were the answer “completely,” then there would be no such thing as administrative law. There would be administrative lore, and administrative practice, and administrative culture, and administrative functions. But administrative *law* consists of the doctrines, statutes, and regulations that limit agency discretion and subject agencies to various forms of oversight.<sup>1</sup>

The most obvious answer to the question of the extent to which agencies should be left to their own devices is, “It depends.” It depends on many things; prominently, it depends on what it is the agency is doing. Congress, the President, and the courts all oversee, influence, and review agencies, but not always, and with varying degrees of stringency and directive authority depending on the circumstances. In this article, I will consider whether the nature of one form of oversight—judicial review—should be affected by the fact that a particular agency action resulted from a collaborative process.<sup>2</sup>

Under current law, the fact that an agency action grows out of a collaborative process does not affect the availability or scope of judicial review. For one thing, most collaborative undertakings lack a specific statutory basis; they are the result of agency initiative and experimentation. Accordingly, there is nothing to displace the existing, default statutory regime for judicial review.<sup>3</sup> Second, courts, for reasons of habit and a predictability juro-centric view of the world, are not quick to conclude that an agency innovation should be exempt from ordinary review.<sup>4</sup> Third, the one significant example of a collaborative governance regime,

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1. As one casebook puts it:

Most broadly, administrative law might be defined as legal control of government. More narrowly, we might say that administrative law consists of those legal principles that define the authority and structure of administrative agencies, specify the procedural formalities that agencies use, determine the validity of administrative decisions, and outline the role of reviewing courts and other organs of government in their relation to administrative agencies.

STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 2-3 (6th ed. 2006).

2. I will use the terms “collaborative governance” and “negotiated rulemaking” (or “reg-neg”) interchangeably. I recognize, of course, that the latter is a subset of the former; but it is the predominant example and the one that has received the most attention.

3. See 5 U.S.C. §§ 701-706 (2006) (Administrative Procedure Act provisions governing judicial review of final agency action).

4. See, e.g., Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1459 (1997) [hereinafter Wald, *ADR and the Courts*] (“[R]eg neg rules usually involve some aspect of public poli-

established by statute, the Negotiated Rulemaking Act (NRA),<sup>5</sup> by its terms does nothing to displace particular agency statutes or the Administrative Procedure Act (APA). Its procedures all precede and supplement those required by the APA, which means that the APA's judicial review provisions, mechanisms, and assumptions remain in place. Indeed, the NRA expressly states that a reviewing court is not supposed to accord a negotiated rule any special deference.<sup>6</sup> Such rules have generally been upheld, usually with no or only passing reference to their reg-neg pedigree.<sup>7</sup> To the extent courts have considered whether that pedigree should influence their review, they have concluded that it should not.<sup>8</sup>

The question is whether that is correct.

## II. BACKGROUND CONSIDERATIONS

The debate over the extent to which agencies should be left alone in turn involves a second fundamental debate, this one about whether agencies are technocratic experts or are just doing what makes sense to them in light of political considerations and their own values and preferences.<sup>9</sup> If they are experts, then oversight—which by definition will be performed by a person or body with less skill and knowledge—can only cause problems. This is particularly true, perhaps, of oversight by elected officials (also known as “political hacks”); but the point also applies to judges, whose motivations may be more pure but who lack expertise and technical training. Thus, it is familiar, if perhaps slightly oversimplified, his-

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cy. Given this, I would not have expected courts to give them any less searching a review than they would apply to rules consummated entirely through regular procedures.”); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 17-25 (1985) (analyzing and criticizing a proposal for limiting judicial review of negotiated regulations).

5. 5 U.S.C. §§ 561-570 (2006).

6. *Id.* § 570 (“Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.”).

7. *See, e.g.*, *Am. Petroleum Inst. v. U.S. Env'tl. Prot. Agency*, 52 F.3d 1113 (D.C. Cir. 1995) (setting aside negotiated rule as inconsistent with the statute, but without mentioning the rule's background); *Cent. Ariz. Water Conservation Dist. v. U.S. Env'tl. Prot. Agency*, 990 F.2d 1531 (9th Cir. 1993) (deferring to statutory interpretation embodied in a negotiated rule without attaching any significance to its background); *Steel Joist Inst. v. Occupational Safety & Health Admin.*, 287 F.3d 1165, 1166 (D.C. Cir. 2002) (upholding a rule and noting, but making little of, the fact that it was “based on a consensus document submitted by a rulemaking advisory committee in a negotiated rulemaking”); *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 907 F.2d 1146 (D.C. Cir. 1990) (upholding EPA regulations without mentioning their negotiated background); *Safe Buildings Alliance v. U.S. Env'tl. Prot. Agency*, 846 F.2d 79 (D.C. Cir. 1988) (upholding EPA regulations without mentioning their negotiated background); *Lifestar Ambulance Serv., Inc. v. U.S. Dep't of Health & Human Servs.*, 604 F. Supp.2d 1372 (M.D. Ga. 2009).

8. *See, e.g.*, *United Keetoowah Band of Cherokee Indians v. U.S. Dep't of Hous. & Urban Dev't*, 567 F.3d 1235, 1246 (10th Cir. 2009) (setting aside a regulation under *Chevron* step one and noting that “the fact that the regulatory scheme was developed through a negotiated rulemaking procedure is of no relevance to this determination”); *Fort Peck Hous. Auth. v. Dep't of Hous. & Urban Dev't*, 435 F. Supp. 2d 1125, 1134 (D. Colo. 2006); *cf.* *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708 (7th Cir. 1996) (expressing some skepticism about negotiated rulemaking and emphasizing that ordinary principles of judicial review apply to challenges to negotiated rules).

9. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (for a broad overview).

tory that the New Deal reformers generally, and James Landis in particular,<sup>10</sup> rested their hopes for administrative government on three basic principles: the affirmation of expertise, agency insulation from central political control, and agency insulation from political oversight.<sup>11</sup> The three very much went together; because the problems faced by agencies are technical ones to which there are right and wrong answers, administrators must be expert, and they should be left alone to do their work. That understanding underlies creation of independent agencies, which were to be independent of political interference. But in the early twentieth century, the idea also existed that agencies should be similarly free of judicial review, for they substituted for and displaced judicial authority.<sup>12</sup> For example, in 1917, Adolph Berle wrote in the *Harvard Law Review*: "Of necessity, a special administrative [body] must exclude the general body—the court, the legislature, the governor and subordinate machinery—in so far as its field extends. Any other rule would mean chaos."<sup>13</sup>

The period after the New Deal, Reuel Schiller reports, was one of particular judicial passivity and deference to administrative agencies.<sup>14</sup> As the Supreme Court and the rest of the federal judiciary became dominated by Roosevelt appointees, many of whom had held other governmental posts, and the constitutional battles of the New Deal ebbed, the Landisian confidence in agency isolation and expertise triumphed in the courts.<sup>15</sup>

Starting in the second half of the twentieth century, however, the general trend has been away from the idea that there is a science of administration.<sup>16</sup> Agencies are more often perceived instead as addressing questions that do not have right answers; as a result, what legitimates agency decisions is a democratic pedigree. On this view, expertise is less relevant and political influence less problematic. Indeed, political influence becomes necessary to give agency decisions legitimacy, for nothing else can do so. Accordingly, we see fewer independent agencies and a steady increase in presidential control of the bureaucracy.<sup>17</sup>

10. See generally JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

11. See, e.g., BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 4-7 (1981); John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1080-94 (2000).

12. See CARL MCFARLAND, *JUDICIAL CONTROL OF THE FTC AND THE ICC, 1920-1930*, at 92 (1933). McFarland complained:

[T]he history of judicial review of regulatory orders of the Federal Trade Commission clearly discloses that the judges substitute their own opinions for those of the commissioners or, even when sustaining the commission, hold themselves in readiness to reverse or modify orders with which they do not agree. The hopes of those who studied the situation during the first years have not been fulfilled.

*Id.*

13. Adolph A. Berle, *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 446-47 (1917).

14. See Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

15. *Id.* at 430-40.

16. See, e.g., Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Learned Since 1946*, 72 VA. L. REV. 271, 281-82 (1986).

17. Gary Edles & Marshall J. Breger, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1210 (2000) (summarizing the falling out of favor of independent agencies); Duffy, *supra* note 11, at 1118-19; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2275-81 (2001) (reviewing history of increasing presidential control).



To some extent, debate over the proper role of *judicial* review lies outside this dispute. Courts suffer from both a democracy deficit *and* an expertise deficit; whichever your model of agency action, courts have little to add. Indeed, this is why *Chevron*<sup>18</sup> offers two basic justifications for strong deference—agencies have an edge in expertise, and they have an edge in democratic legitimacy—without choosing between them.<sup>19</sup> Thus, no theory of judicial review, unlike presidential or congressional oversight, endorses the substitution of the court's judgment for the agency's. The justifications for judicial review involve ensuring that the agency is doing its job properly, according to requisite procedures, and within legal boundaries. This understanding of judicial review still resonates with the expertise and preference models. On the one hand, judicial review enforces popular preferences by ensuring that the agency is acting consistently with congressional constraints, which are deemed to reflect popular preferences. And on the other, by insisting on reasoned decision-making and adequate explanations, judicial review ensures that the agency decision really does reflect expertise.

The case for collaborative governance makes claims under both the expertise and preference aggregation models, but the latter is far more important. To be sure, part of the idea is to tap into the expertise of the people with the most knowledge and the most precise understanding of the burdens and benefits of (and possible alternatives to) a given regulatory proposal.<sup>20</sup> But information-gathering of that sort is possible without everyone sitting down around a table,<sup>21</sup> and agencies do it in many effective, non-collaborative ways. Indeed, some critics of reg-neg suggest that participants will withhold information strategically,<sup>22</sup> and even boosters perceive information asymmetries among the participants as a defect in the process.<sup>23</sup> In addition, the expertise claim for reg-neg is limited to its value in producing useful *information*. But "expertise" is not the same as knowledge. The agency's expertise, by hypothesis, lies in its understanding of the overall statutory and regulatory regime, the choices between regulatory tools, the brass tacks of

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18. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

19. *Id.* at 865-66 (noting that because "[j]udges are not experts in the field," "are not part of either political branch of government," and "have no constituency," they should defer to agency policy-making).

20. See, e.g., Lee M. Thomas, *The Successful Use of Regulatory Negotiation by EPA*, 13 Admin. L. News No. 1, at 2, 3 (Fall 1987) (noting that EPA pursued regulatory negotiation in part because of a desire to "bring to the table as much technical information as possible").

21. U.S. ENVTL. PROT. AGENCY, OFFICE OF POLICY, PLANNING & EVALUATION, AN ASSESSMENT OF EPA'S NEGOTIATED RULEMAKING ACTIVITIES 12 (1987) ("While negotiators may bring some relevant data to the table, negotiated rulemaking is certainly not the only way, nor is it necessarily the best way, to obtain data, especially detailed scientific and technical data on the nature and extent of health and environmental risk and on the technological and economic feasibility of alternative solutions."), reprinted in NEGOTIATED RULEMAKING SOURCEBOOK 23, 34 (David M. Pritzker & Deborah S. Dalton eds., 1995).

22. See, e.g., Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069, 1078 (2000) (noting that regulated entities may withhold information during the negotiation); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1209 (1994) ("Negotiation is not effective when technical information is needed to resolve factual disputes."); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 641 (2002) (summarizing and citing to the literature).

23. Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 123 (2000).

actual rule-writing, the challenges of enforcement, the role of the market, and other aspects of public administration that private entities lack. Negotiated rule-making adds nothing in this respect and, to the extent the agency defers to the group, might produce results that the "expert" would deem suboptimal.

Accordingly, the stronger claim for collaborative governance sounds not in expertise but in democracy. I use the term advisedly, for one standard objection to reg-neg is that it is *undemocratic*.<sup>24</sup> That objection rests on an understanding of agencies as accountable actors; because reg-neg involves the shift of decision-making authority from accountable public entities to unaccountable private parties, it is a shift away from democratic decision-making. However, if the collaborative process is truly inclusive, leading to a consensus among representatives of all stakeholders, then it can claim a democratic legitimacy that ordinary agency decision-making lacks (and some agency decision-making, reflecting the asymmetries in access and information of different interests, lacks profoundly). What makes the outcome worthy of respect, then, is that it reflects consensus among all stakeholders. It is this consensus that bestows reg-neg its "legitimacy benefit" among the participants and its claim to the respect of nonparticipants.<sup>25</sup> The collective judgment is not so much *correct*, though it may be that, as it is *agreed upon*.<sup>26</sup>

Now, we have a model for judicial review of such decisions: it is that other "judicial review"—judicial review of legislation. Legislation, too, may be right, but mainly it just is. What legitimates it is not the legislators' expertise, but their democratic mandate and constitutional lawmaking authority. And judicial review of legislation is extremely limited. Courts merely ask if the law is constitutional and, in general, that means rationality review of the most toothless sort, far less ferocious than really any version of arbitrary and capricious review of administrative agencies.<sup>27</sup> So here's the strong proposition: because collaborative gover-

24. See, e.g., Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1281 (1994) (dismissing regulatory negotiation as "inadequate" if one accepts a basic commitment to the democratic legitimacy of the administrative process).

25. See generally Freeman & Langbein, *supra* note 23.

26. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 17 (1982) ("Agency actions no longer gain acceptance from the presumed expertise of its staff. It is no longer viewed as legitimate simply because it fills in the gaps left by Congress, or because it is guided by widely accepted public philosophy. To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments. . . ."); see also Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1039 (2007) ("Traditional APA rulemaking attempts to garner legitimacy by relying on agency expertise, whereas negotiated rulemaking derives its legitimacy from interested parties and the agency reaching a consensus . . ."). Or, in the words of two reg-neg skeptics rather than yet another booster: "Under the EPA's concept of reg neg, the agency is reduced to little more than a regulatory real-estate agent, whose true client is neither the buyer nor the seller, but the deal that can be struck between them." Rena Steinzor & Scott Strauss, *Building a Consensus: Agencies Stressing "Reg Neg" Approach*, LEGAL TIMES, Aug. 3, 1987, at 16, 17.

Under the NRA, the agency must still go through a notice-and-comment process, and retains the authority to abandon the consensus proposal in the final regulation. For many reasons, it will be reluctant to do so. See *infra* text and notes at nn. 86-87. Nonetheless, that possibility means that existing reg-neg is shy of the platonic ideal of negotiated rulemaking; to the extent it is just standard agency rulemaking, the argument for a different approach to judicial review evaporates.

27. It is black-letter law that the arbitrary and capricious test is more demanding than rationality review under the due process clause. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42-43, 44 n.9 (1983).

nance does not so much *implement* legislative decision-making as it *replaces* it, courts should review it like they review legislation. Since it is *not* legislation, a court must make a threshold determination that what it is reviewing is a bona fide instance of collaborative governance that resulted from a truly representative and procedurally adequate process. But as long as that threshold determination was made, courts should accept the outcome of the process.

Hints of such restrained judicial review are present in recent proposals for negotiated policy-making that would be less agency-centered and more “democratic.” For example, David Fontana argues for the creation of what he calls “democracy index rulemaking.”<sup>28</sup> This would come in two versions. One is a small change to existing notice-and-comment procedures. At the close of the comment period, the agency would have to prepare a “democratic participation statement” indicating the number and source of relevant and non-repetitive comments. Fontana proposes that the greater the level of public participation—the higher the rule’s “democracy index”—the more deferential should be the judicial review.<sup>29</sup> His bolder proposal is for “deliberative notice and comment.” This procedure would involve inviting stakeholders and lay citizens to participate in “randomly organized juries” that would produce an evaluative report to the agency about a proposed rule.<sup>30</sup> The report would not bind the agency; Fontana still imagines that the agency would have the authority to reject the results of these discussions, though it would have to take them seriously.<sup>31</sup> But the resulting rule would be subject to highly deferential judicial review.<sup>32</sup>

Or consider Keren Azulay’s proposal for “Constructive Controversy Deliberations.”<sup>33</sup> This idea is less tied to agency decision-making; it is a mechanism for resolving public issues that have generated controversy and, it would seem, led to a lawsuit. The idea is to get contentious issues out of the courts, rather than getting them out of agencies.<sup>34</sup> Azulay’s article is focused on the mechanisms for selecting participants for a deliberative process; she is largely silent about the judicial role in overseeing or reviewing the results of the process that follows initial selection. But it is clear that she, too, imagines substantive review of the lightest sort—merely ensuring that the outcome “falls within a zone of reasonableness.”<sup>35</sup>

Finally, the boldest proposals for policy-making through “juries,” deliberative polling, and the like come from non-lawyers, who are not steeped in administra-

28. David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81 (2005).

29. *Id.* at 90. Without assessing Fontana’s proposal in full, I would note that his confidence in judges’ ability to precisely calibrate their level of scrutiny according to the rule’s democracy index rests on some heroic assumptions; if judges are really that capable, the country would be best off if judicial review was not deferential in the least.

30. *Id.* at 91-96.

31. *Id.* at 95.

32. *Id.* at 98-99.

33. Keren Azulay, *Knights of the Round Table: Participant Selection Mechanism for Court-Related Deliberations*, 40 *CREIGHTON L. REV.* 733 (2007).

34. “CCD seeks to circumvent these criticisms by devising a decisionmaking procedure that challenges the traditional role of courts. Under CCD, courts, instead of ruling on issues where there is deep moral disagreement, instigate and supervise the formation of a deliberative procedure and review its outcome.” *Id.* at 739.

35. *Id.* at 738.

tive law traditions. For them, judicial review disappears from the picture altogether, precisely because the model is one of direct democratic policy-making, rather than agency implementation.<sup>36</sup> Presumably the outcomes of these processes would be reviewed for constitutionality and nothing else, like legislation.

For the true believer, then, there is not much that courts can bring to the table. In contrast, for the skeptic, judicial review of collaborative governance should be especially strenuous. Precisely because of its similarity to the legislative process, collaborative governance is especially likely to suffer from exactly the defects judicial review exists to catch. If the process is nothing but a massive delegation of government authority to the private sector, then judicial policing of the outcomes is vital. The strenuousness of review should be tied to the risk of illegality, which is especially high here, for the chances of the agency exceeding or ignoring statutory limits or tolerating an incoherent or suboptimal result are greatest when there is the momentum of stakeholder consensus supporting a particular outcome.<sup>37</sup>

Thus, one's willingness to take this strong position depends not so much on one's belief or confidence in courts as it does on one's belief or confidence in collaborative governance. On this, I confess agnosticism. But in the pages that follow, I will explore the implications for judicial review of the strongly held opposing positions of collaborative governance generally and negotiated rulemaking in particular.

### III. SCOPE OF REVIEW DOCTRINES

The basic goals or justifications of judicial review are to ensure (a) the legality; (b) the rationality; and (c) the procedural regularity of agency action. The question is whether the need for judicial oversight on any of those three scores is altered when the action in question is one form or another of collaborative governance rather than unilateral agency action. And one's answer to that is likely to depend on whether one is a true believer or a skeptic when it comes to collaborative governance.

#### A. Substantive Rationality and Reasoned Decision-Making

The strong position is that courts should review agency action for rationality but only in the limited sense that a deeply irrational governmental action is un-

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36. See, e.g., JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009). Fishkin is arguably the leading proponent of deliberative polling as a policy-making tool.

37. See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997) (objecting that "the principles, theory, and practice of negotiated rulemaking subtly subvert the basic, underlying concepts of American administrative law"); *id.* at 1387 (arguing that the incentives for rulemaking by consensus "subvert the principles underlying traditional administrative law by elevating the importance of consensus among the parties above the law, the facts, or the public interest"); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987) (arguing that a particular reg-neg produced an illegal rule).



constitutional. As discussed above, the analogy is to the legislative process.<sup>38</sup> The legislative process is deliberative and political, reaching outcomes through compromise and logrolling. The outcome may well be incoherent. Explanations may be dubious, self-serving, or absent altogether. But for better or worse, decision-making authority has been placed with the legislature, subject to electoral constraints, and therefore we live with some goofiness and don't expect elegant internal consistency. As with juries,<sup>39</sup> the authority of the decision-maker leads courts to treat the process as a black box.

The strongest version of such an approach is "pure procedural justice." In such a regime, the idea of the "correct outcome" is incoherent, for there is no independent or external metric against which to evaluate the outcome. The correct outcome, by definition, is the one that results from the designated process.<sup>40</sup> The standard example is gambling. There is no right result from throwing dice or spinning the roulette wheel; the outcome is the outcome, and as long as the dice were not loaded and there were no magnets in the roulette wheel, there is nothing to say about the result except that it is the result.<sup>41</sup> The idea of a substantive objection is incoherent.

To the reg-neg true believer, these analogies to legislatures, juries, and gambling should be powerful. Confidence in the process—which mimics the legislative process, has some of the elements of popular decision-making valued in juries, and leads to outcomes that are "right" because they result from the process—argues for highly deferential judicial review of outcomes. Moreover, to the extent arbitrary and capricious review is supposed to ensure that the agency considers alternatives and carefully thinks things through, it is redundant. Careful consideration is built in to the process. The agency cannot avoid considering (relevant) alternatives because the process compels thoroughness in that regard. Finally, to the extent that courts directly consider the substantive "reasonableness" of the rule, the fact that it has the consensus support of all stakeholders is a pretty powerful (perhaps dispositive?) indicator of reasonableness.<sup>42</sup> But most impor-

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38. See, e.g., Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 68 (1986) ("[N]egotiated rulemaking is like legislation—a method for reaching a political accommodation.").

39. The law's hands-off treatment of jury verdicts is another setting in which inconsistencies and explanatory gaps are accepted as a matter of course. Consider, in particular, the problem of inconsistent jury verdicts. Powerful arguments have been made that at least in some circumstances inconsistent verdicts should not be allowed to stand. See, e.g., Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771 (1998). Yet the Supreme Court is unfazed. "While symmetry of results may be intellectually satisfying, it is not required." *Standefor v. United States*, 447 U.S. 10, 25 (1980). Logically, they should be a real problem, but in this setting we put up with a level of irrationality that would be both inconceivable and intolerable from an agency.

40. See JOHN RAWLS, *A THEORY OF JUSTICE* 85-89 (1971). Rawls distinguishes pure, perfect, and imperfect procedural justice. Imperfect procedural justice is exemplified by the criminal trial; we can define the correct outcome by an independent criterion but lack procedures that ensure it is reached. See *id.* at 85-86. Perfect procedural justice always accomplishes the desired outcome. See *id.* at 85. In a system of pure procedural justice, we do not know, or have abandoned the effort to define, the correct outcome; instead, whatever outcome the process produces is by definition fair.

41. *Id.* at 86.

42. See Wald, *ADR and the Courts*, *supra* note 4, at 1468 (stating that "the court should be able to take account of consensus as a factor suggesting the reasonableness of the rule").



tant, an inquiry into substantive reasonableness or the quality of the analysis is out of place for the reasons discussed above.<sup>43</sup>

Needless to say, this hands-off approach seems completely at odds with accepted understandings of arbitrary and capricious review, requirements of “reasoned decision-making,” and the Supreme Court’s endorsement of “hard look” review in *State Farm*.<sup>44</sup> The exact status of *State Farm* can be debated, but there is no question that judicial review under the arbitrary and capricious standard has some teeth. If a regulation has nothing to recommend it other than stakeholder consensus, that is the very model of arbitrary and capricious action under *State Farm*.<sup>45</sup> Nonetheless, one might conceivably square “soft glance”<sup>46</sup> review of reg-neg with *State Farm* by returning to the distinction between expertise and politics with which I began.

Part of the disagreement between the five-justice majority and the four dissenters in *State Farm* was over the role of politics in agency decision-making. The challenged action was the repeal by the new (Republican) administration of a regulation that had been issued by its (Democratic) predecessor. Justice Rehnquist’s dissent emphasized that the change was predictable, understandable, and reasonable—and, therefore, legally valid—in light of the fact that Ronald Reagan had won the previous presidential election. The policy shift was legitimated by the democratic consensus reflected in Reagan’s victory, which followed a campaign in which deregulatory promises figured prominently. For Rehnquist, the agency did not have to *explain* anything; it got to do what it wanted because it had been elected to do what it wanted (which was roughly congruent with what a majority of the electorate wanted). Writing for the majority, Justice White ignored this line of argument entirely. He insisted that the agency produce a coherent explanation and that the explanation go beyond the simple truism that “we’re in charge now.”<sup>47</sup> Accordingly, *State Farm* separated politics and policy; the former could not justify the latter; agencies had to justify their decisions on the basis of facts, technical considerations, logic, or statutorily relevant factors.<sup>48</sup>

The Rehnquist position has gained traction in some circles in the decades since *State Farm* was decided. For example, in a recent article, Kathryn Watts argues that political considerations should *always* be relevant to arbitrary and

43. See also Daniel J. Fiorino, *Regulatory Negotiation as a Policy Process*, 48 PUB. ADMIN. REV. 764, 770 (1988) (“[Regulatory negotiation] subordinates the fact and value premises of decision to the instrumental needs of the parties as they seek consensus . . . . [N]egotiation stands in contrast with the net-benefit and other analytically-based policy models.”).

44. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983).

45. In a well-known early article, Henry Perritt put it more mildly: “a rule promulgated solely because it is agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious.” Henry H. Perritt, Jr., *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 Pepp L. Rev. 865, 910 (1987).

46. The phrase was coined by William Rogers in describing the Supreme Court’s deferential approach to agency actions under the National Environmental Policy Act. See William H. Rodgers, Jr., *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

47. See *State Farm*, 463 U.S. at 46-57; see also Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. L. REV. 297, 310-11 (2004) (“Justice White did not contradict Justice Rehnquist’s description of the political setting or conclude that it was outweighed by other factors. Rather, he ignored it altogether, implicitly deeming the politics of the rescission simply irrelevant.”).

48. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 226 (1990) (“the submerged yet powerful message in the Supreme Court’s decision in *State Farm* [was] that the political directions of a particular administration are inadequate to justify regulatory policy”).

capricious review.<sup>49</sup> But those circles do not include the courts, which have stood by the technocratic approach to arbitrary and capricious review established in *State Farm*.<sup>50</sup> Indeed, the Supreme Court's recent greenhouse gas decision, *Massachusetts v. EPA*,<sup>51</sup> can be seen as *State Farm* triumphant, "part of a trend in which the Court has at least temporarily become disenchanted with executive power and the idea of political accountability and is now concerned to protect administrative expertise from political intrusion."<sup>52</sup> Nonetheless, if there is *any* setting in which the Rehnquist position works well, it is with regard to collaborative governance. The election of a president, and presidential control over agencies, can be dismissed as too dilute, indirect, and uncertain to justify forgoing a reasoned explanation for agency action. But hands-on participation of the affected parties in formulation of a government policy is a much more direct and pure form of popular decision-making. Therefore, the argument would go, there is no need for judicial oversight of the rationality of what the agency has done, and, therefore, no need for a good explanation to ensure and enable meaningful judicial review of such rationality.

Of course, at the extreme, the perversity of a given outcome makes it unconstitutional. The black-letter rule under *State Farm* is that the arbitrary and capricious test is more exacting than is the rationality requirement under the due process clause. But in the collaborative governance setting, the foregoing suggests that would not be the case; rather, the only substantive review would be for constitutionality and nothing more.

### B. Legality

The second basic ground for judicial review is legality. We look to the courts to police the boundaries of agency authority, particularly those established by statute.<sup>53</sup> Indeed, this is the most basic and obvious justification for judicial review. Agencies are creatures of statute; they have only those authorities granted by Congress; they are subject to statutory limitations; under the rule of law, courts are necessary to police those legal boundaries.<sup>54</sup> Accordingly, courts must set

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49. Kathryn Watts, *Proposing a Place for Politics in Arbitrary-and-Capricious Review*, 119 YALE L.J. 2 (2009).

50. *See id.* at 14-23.

51. 549 U.S. 497 (2007).

52. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54.

53. I set to one side review for constitutionality. *See* 5 U.S.C. § 706(2)(B) (2006). There is no serious argument for immunizing collaborative governance from judicial review for constitutionality. More precisely, there is no reason to preclude such review in this setting *in particular*. I only address judicial review for nonconstitutional defects.

54. *See, e.g.*, Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 442-43 (1989) (describing judicial review, which requires agencies to demonstrate their authority for action, as "at the heart of a commitment to the rule of law"); Richard Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 NYU L. REV. 1239 (1989).

aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."<sup>55</sup>

Here again, one could argue that this model is inapplicable to reg-neg, which is itself a form of lawmaking. To take full advantage of the benefits of reg-neg, outcomes should not be bounded by statutory limits; we should not entrench statutory decisions for agencies any more than we should for legislatures. Thus, Bill Funk may be entirely correct in arguing that EPA's negotiated wood stove rule was illegal under the Clean Air Act,<sup>56</sup> but we should not care. Because this is a democratic, quasi-legislative process, nothing is to be gained by having courts determine whether it is consistent with a statutory mandate. Either it is consistent, in which case there is no value in checking. Or it is not, in which case it is, by hypothesis, an improvement.<sup>57</sup>

This idea, and the discomfort it generates, are captured compactly in the much-quoted adage *within* EPA about another collaborative effort, Project XL: "If it isn't illegal, it isn't XL."<sup>58</sup> But let me offer a different example from the early days of modern environmental law, which was a sort of reg-neg before such a concept existed.

The original version of the modern Clean Water Act, enacted in 1972, required EPA to establish effluent standards for the discharge of toxic water pollutants. The standards were to be based solely on considerations of human health and environmental quality; considerations of cost and available technology were off limits. After four years, EPA had managed to produce a grand total of zero such standards. The Natural Resources Defense Council and other environmental groups sued, multiple times.<sup>59</sup> There was no question EPA had missed the statutory deadlines; the only question was what relief would be appropriate. The parties entered into an agreement under which EPA would issue standards under a completely different regulatory approach, one based on the best available technology. Judge Thomas Flannery gave his blessing to this arrangement in an eponymous consent decree.<sup>60</sup> The consent decree was inescapably and flatly inconsistent with the Clean Water Act. Had EPA written regulations, on its own initiative, in the

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55. 5 U.S.C. § 706(2)(C) (2006); *see also id.* § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.").

56. *See* Funk, *When Smoke Gets in Your Eyes*, *supra* note 37.

57. One other thing to consider is how the availability of judicial review for compliance with the statute affects the dynamics of the negotiation. At present, one of the things that someone at the table can say is: that's illegal. Eliminating judicial review would eliminate that argument. Perhaps that would systematically reduce the clout of certain interests, or eliminate a useful constraint. Alternatively, however, it might enhance the process; it would be liberating, freeing the participants to do what is sensible, unconstrained by the artificial or poorly thought-through constraints from the legislature.

58. Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 147 (1998) (quoting an unknown Environmental Protection Agency staff member). Alternatively, and more pungently, "if it ain't illegal, it ain't XL." MALCOLM SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 23 (2000).

59. The procedural history of the litigation is set out in *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1234-35 (D.C. Cir. 1980).

60. *Natural Res. Def. Council v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *rev'd in part on other grounds sub nom. Natural Res. Def. Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977). The story of the litigation and its aftermath is recounted in Rosemary O'Leary, *The Courts and the EPA: The Amazing "Flannery Decision"*, 5 NAT. RESOURCES & ENV'T 18 (1990).

manner approved by the decree, any court in the country would have set aside the regulations as inconsistent with the statute. Nonetheless, Judge Flannery accepted the agreement of EPA and the environmental group plaintiffs, ignored the objections of industry intervenors, and approved this entirely different approach to standard-setting.<sup>61</sup> Now, the Flannery Decree cannot be said to be a reassuring example of something that was a reg-neg in everything but name because the stakeholders did not, in fact, reach a consensus; industry groups were strongly opposed.<sup>62</sup> But it stands as an example—in retrospect, most would say a highly successful example by objective measures—of judicial approval of an agreed-upon approach to a problem that was simply unavailable under the statute.

One further justification comes into play here, and it is relevant to the other sections of the discussion as well. A familiar justification for judicial review is that agencies are more subject to interest group capture than are courts.<sup>63</sup> If that is in fact the case—not everyone thinks it is<sup>64</sup>—the concern about capture should be far more dilute in the collaborative governance setting. If the process of collaboration has been full, fair, and open to all affected interests, and the outcome acceptable to all, then capture by a particular group or groups has been, by definition, avoided. Of course, once again, this conclusion depends on whether one can swallow this rosy depiction of reg-neg. Skeptics view the negotiation not so much as a means of avoiding capture as the opposite. Judge Posner has written that for an agency to be bound by a private consensus “sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the ‘capture’ theory of administrative regulation.”<sup>65</sup>

Now, this strong version of judicial non-review is not reflected in the NRA. The NRA only produces a proposed rule, not a final rule; after that, the APA takes over, intact. Under the NRA, (a) the agency makes the final decision (b) subject to statutory constraints, and (c) the court reviews compliance with the APA and background statutes. Yet, if one *really* has confidence in the process, and *really* all interests are represented, why not just let the participants decide, without the ignorant, paternalistic, inefficient intrusion of the courts? One might compare this to how true believers in markets feel about regulation. For example, free marketers contend that, absent externalities, people should be able to negotiate for their preferred balance of safety and wealth. Workers and employers should be able to opt for higher wages and riskier workplaces; manufacturers and purchasers should be able to agree on a trade-off of price and risk in consumer products—no Occupational Safety and Health Administration and no Consumer Products Safety Commission. To its staunchest advocates, reg-neg has many of the same, seemingly magical, qualities that the market possesses in the eyes of its staunchest advocates and should be left alone to work that magic.

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61. Congress subsequently amended the statute to incorporate the essentials of the Flannery Decree. Clean Water Act of 1977 § 53, Pub. L. No. 95-217, § 53, 91 Stat. 1566, 1589-90 (1977), codified as amended at 33 U.S.C. §§ 1317(a)(1)-(2) (2006).

62. O’Leary, *supra* note 60, at 20.

63. See, e.g., Mark Seidenfeld, *Demystifying Ossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 501-502 (1997); Sunstein, *supra* note 16, at 289.

64. For a highly skeptical discussion, see Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314-26 (1999).

65. USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996).



There is one large barrier to abandoning *all* judicial review for legality. It is the Constitution. Congress makes the laws. It can delegate, massively, but other actors, including agencies and reg-neg committees, can only act legislatively to the extent they have congressionally delegated authority to do so.<sup>66</sup> Part of what makes this delegation permissible is judicial review, at least according to many judges.<sup>67</sup> Accordingly, it would be a challenge to convince courts to permit or adopt a regime of *no* judicial review for consistency with the statute.

The milder position, then, would be that judicial review to determine consistency with the statute should take place but in a highly deferential form. Phil Harter has advocated such an approach. For example, defending the EPA's wood stove rule, he writes, "while the rule may not fit comfortably within a narrow reading of the Clean Air Act, it is within its overall theory, and a decision that is reached by a democratic process should be accorded some leeway in that regard."<sup>68</sup> To paraphrase a familiar Scalia-ism, it is "good enough for non-government work." I am not sure that this approach is entirely coherent; it stakes out something of the same awkward ground as the concept of being only a little bit pregnant. However, there is at least one place in the law where something similar takes place, namely judicial approval of settlements.<sup>69</sup> Collaborative governance is a kind of settlement and ought perhaps to be reviewed in the same way. That would mean, at a minimum, that courts could approve an agency action that the statute does not itself *require* (and, thus, that courts could not themselves mandate).<sup>70</sup> However, it could also mean courts could approve negotiated agreements that go beyond what the statute *allows*.

### C. Procedures

The legislative analogy would argue against judicial review of procedural adequacy as well. After all, courts have always been highly reluctant to police legislative procedures. The due process clause has been held not to apply to legislatures;<sup>71</sup> the enrolled bill doctrine precludes judicial investigation into compliance

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66. See, e.g., Toni M. Fine, *Appellate Practice on Review of Agency Action: A Guide for Practitioners*, 28 U. TOL. L. REV. 1, 2 (1997) ("agencies are creatures of statute, whose existence and powers exist only by virtue of Congress. In this connection, they are subject to limits on their delegated power as established by their enabling statutes . . .").

67. *Ethyl Corp. v. U.S. Envtl. Prot. Agency*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegations—because there is court review to assure that the agency exercises the delegated power within statutory limits.").

68. Philip J. Harter, *A Plumber Replies to the Philosophers: A Comment on Professor Menkel-Meadow's Essay on Deliberative Democracy*, 5 NEV. L.J. 379, 384 n.34 (2004-2005). See also Harter, *supra* note 38, at 63-64 (suggesting that "a bit of play is needed in the joints of the statute" and calling on reviewing courts "to define the authority of the agency but provide a little leeway to accommodate practical interpretations and implementation").

69. On the standards for such approvals generally, see *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 2025-26 (2d Cir. 1992).

70. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.").

71. See *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).



with specific constitutional requirements for legislation;<sup>72</sup> courts almost never review or enforce Congress's own rules;<sup>73</sup> and the periodic academic calls for judicial scrutiny of "due process of lawmaking"<sup>74</sup> have gone unheeded. The Supreme Court has taken a small step in this direction by purporting to treat legislation supported by congressional findings with greater respect than legislation adopted without such findings,<sup>75</sup> but (a) that incentive is a far cry from direct judicial review of congressional procedures and (b) the Court has received a chorus of academic criticism for doing so.<sup>76</sup> Indeed, the critics often state their objection as being that the Court is treating Congress "like an administrative agency."<sup>77</sup> As discussed above, the true believer would argue the opposite side; that in the reg-neg setting, courts should treat agencies "like Congress." If that is correct on the substantive side, shouldn't it also be correct on the procedural side?

Such an argument is, in fact, wholly misplaced. For it is only because certain procedures have been followed that the agency outcome would merit the deference afforded the legislature. It is pure bootstrapping to extend that deference to procedural requirements. Because it has followed certain procedures, the agency is reviewed as if it were Congress; because the agency is reviewed as if it were Congress, the court should not scrutinize its procedures! What tidy circularity. To the contrary, judicial review would seem to be quite important, precisely because a prerequisite for the legitimacy of the collaborative process and the premise of the undertaking is that certain procedures will be followed. In addition, it is a familiar idea in judicial review of agency action that, to some extent, procedural and substantive review are alternatives. The case for mild or nonexistent substantive review is stronger where strict procedural review occurs, and vice versa.<sup>78</sup> Thus, the analogy is not to the non-justiciability of claims regarding legislative

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72. *Field v. Clark*, 143 U.S. 649, 668-73 (1892) (holding that signature by President and both Houses of Congress renders statute constitutional, notwithstanding allegation that enrolled bill omits portions of legislation actually passed by both houses). For a rare, and quite inconsequential, instance of the Court actually reviewing whether constitutional procedures for legislation had been complied with, see *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (considering whether a law was invalid because it was a revenue-raising measure that had not originated in the House).

73. See, e.g., *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) (refusing to review House allocation of committee seats on separation-of-powers grounds, while also confirming power to review rules for "constitutional infirmity"); see generally Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1275 ("When courts do not summarily dismiss procedural claims, they accord extraordinary deference to the legislature.").

74. For the first and still most important example, see Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

75. See, e.g., *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

76. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 119-35 (2001).

77. The phrase began with, or at least is strongly associated with, Justice Breyer, who objected in a dissent that the Court was "reviewing the congressional record as if it was an administrative record." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting).

78. Although "hard look review" came to mean a searching judicial review of the agency's reasoning and substantive position, it originated in the idea of ensuring that the agency had taken a hard look at the problem, as evidenced by the fullness and openness of its procedures and the thoroughness of its reasoning. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating that the reviewing court must ensure that "the agency has . . . really taken a 'hard look' at the salient problems, and has . . . genuinely engaged in reasoned decision-making").

procedures, but to the justiciability, and the important role of the courts in adjudicating, (most) claims regarding elections.<sup>79</sup>

The most important procedural requirement in reg-neg is that all affected interests have a seat at the table.<sup>80</sup> The process itself is designed to maximize the chances that they will, and the agency has important incentives to be inclusive in putting together a committee. Nonetheless, one would have to have extraordinary confidence in those incentives and in agency good faith to conclude that procedural review was unnecessary.<sup>81</sup> An excluded entity has to be able to go to court to argue that it should have been present.

It is equally important that the rule actually reflect a consensus. The legitimacy of the outcome lies in the fact that it reflects consensus; what makes it rational is that the participants agreed to it. While outright fraud is unlikely, judicial review would catch, and, more importantly, deter, instances where consensus was inadequate and objections were overridden.

Of course, the NRA does not require the exacting procedural review I have just argued for. To the contrary, "any agency action relating to establishing, assisting, or terminating a negotiated rulemaking shall not be subject to judicial review."<sup>82</sup> Though almost never litigated, presumably because potential litigants

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79. At a high level of abstraction, the claim here echoes representation-reinforcing theories of (constitutional) judicial review. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

80. See, e.g., 5 U.S.C. §§ 564(a)(8), (b) (2006); Azulay, *supra* note 33, at 759-65; Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809, 829 (1994); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 996-97 (1993).

81. Writing a generation ago, Dick Stewart contemplated the possibility of new structures to actualize an interest-group representation model of administrative decision-making, one of which was for private interest groups designated by Congress to select administrative officials who would serve fixed terms. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1794-97 (1975). "Policy would result from a process of bargaining among the representatives of affected interests. Unlike a judicially developed system of interest representation, where policy is made by non-elected agency officials or judges, the representative process would determine, and presumably legitimate, policy." *Id.* at 1790. In such a regime:

the developing judicial role in controlling agency discretion by expanding participation rights at the agency level and insisting upon adequate consideration of all affected interests would, in theory, be severely circumscribed. Since agency policy would result from a bargaining process in which all affected interests (as determined by the legislature) are directly or indirectly represented, there should be no occasion for judicial inquiry into the nature of the interests that participate in the decision-making process or into the consideration (adequate or otherwise) accorded to each of the competing interests, so long as the council remained within the usually broad confines of applicable statutes.

*Id.* at 1799.

This vision of a constrained judicial role is in fact wholly consistent with the discussion herein. On the one hand, substantive policy review drops out for the reasons discussed above. In Stewart's imagined regime, procedural review is also dilute, but that is because Congress has designated specific participants, which eliminates the central role for the courts. In reg-neg as it exists, the agency assembles a committee subject to Congress's requirements of balance, comprehensiveness, and so on; that instantiates the interest-representation model, but gives the courts a central role in ensuring compliance with Congress's requirements. And apart from this role of enforcing statutory commands, what Stewart describes as "the developing judicial role in controlling agency discretion by expanding participation rights at the agency level and insisting upon adequate consideration of all affected interests" remains appropriate—if anything more so—in the reg-neg setting.

82. 5 U.S.C. § 570 (2006).

can read, this provision has been taken to mean what it says, and no challenges to the composition of a committee or other NRA procedures have gone forward.<sup>83</sup>

How can this provision be justified? Three justifications are plausible; all stem from the fact that the NRA is a quite partial step toward true collaborative governance. First, the bar on review reflects a reasonable desire to avoid having the reg-neg process derailed by “interlocutory” judicial challenges.<sup>84</sup> This limitation is not inappropriate, but goes to timing rather than availability of review.

Second, the practical impact of the bar on review is very slight, and probably nonexistent, because the whole procedure is voluntary. Therefore, an argument that the agency failed to comply with the NRA is almost certainly doomed to failure on the merits.<sup>85</sup> The bar on bringing the claim in the first place is a more efficient route to the same result. This justification turns entirely on the voluntary and partial nature of reg-neg under the NRA; under a more robust or mandatory reg-neg regime, it would disappear.

The third possible justification is the weakest of the three. Conceivably, it rests on the idea that the reg-neg is not the “real” process since it only produces a proposed rule. It is an entirely voluntary and *ex ante* addition, prior to the required APA notice-and-comment process. Accordingly, any and all errors can be deemed harmless. Since it is legally unobjectionable to have *no* process at all, there can be no complaint about an *inadequate* process. Something is better than nothing, and any defects can be cured through the regular notice-and-comment proceeding. This argument is quite flawed, a classic, mistaken greater-includes-the-lesser argument.<sup>86</sup> Defects in the antecedent process cannot be so easily dismissed. Agency and stakeholder commitment to a consensus rule, even if it is formally only a proposal, really does affect the final outcome. Indeed, that is precisely the point.<sup>87</sup> All that said, it remains the case that the argument for strong

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83. See, e.g., *Center for Law & Ed. v. U.S. Dep’t of Ed.*, 209 F. Supp. 2d 102, 106-08 (D.D.C. 2002) (denying review of composition of negotiated rulemaking committee), *aff’d on other grounds*, 396 F.3d 1152 (D.C. Cir. 2005) (holding that the plaintiffs lacked standing to challenge the composition of the committee). This case actually arose under the No Child Left Behind Act (NCLBA), which requires the Department of Education to “use a negotiated rulemaking process” when promulgating certain regulations. 20 U.S.C. § 6571(b)(3)(A) (2006). The process “shall not be subject to the Federal Advisory Committee Act, but shall otherwise follow the provisions of the Negotiated Rulemaking Act of 1990.” *Id.* § 6571(b)(4). On appeal, Judge Edwards, while agreeing with the majority that the plaintiffs lacked standing, wrote separately to explain that the NRA’s bar on challenges to the composition of the committee did not apply. In his view, the relevant statute was the NCLBA, which itself contained no such prohibition and which did not incorporate the entire NRA by reference but simply required the Department to employ certain procedures set out in the NRA. *Id.* at 1163-64 (Edwards, J., concurring). The majority did not address this issue.

84. See 135 Cong. Rec. S10,060 (daily ed. Aug. 3, 1989) (statement of Senator C. Levin) (stating that the provision was intended “to allow agencies to use negotiated rulemaking without the delays and procedural problems that might arise if judicial review of intermediate agency actions were available”).

85. See, e.g., *Texas Office of Pub. Utility Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001) (rejecting argument that agency’s *ex parte* contacts violated the NRA, since nothing required the agency to comply with the NRA in the first place).

86. See generally Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227 (analyzing the pitfalls of greater-includes-the-lesser arguments).

87. Choo, *supra* note 22, at 1116-17; William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 195-96 (2009) (criticizing the extent to which the agency is, as a practical matter, bound by the committee consensus). As Phil Harter has written, somewhat ominously, with regard to the agency’s authority to propose or promulgate a rule different from the committee consensus:

procedural review would be more compelling if the process began and ended with the negotiation.

For the above reasons, the fact that the NRA does not permit judicial policing of compliance with its procedures does not, in itself, argue strongly against such a judicial role as a general proposition. The NRA bar fits with the fact that the NRA is a rather dilute form of collaborative governance—an add-on to, rather than a substitute for, traditional agency decision-making. In a real collaborative governance regime, judicial scrutiny of procedural validity would be essential.

That leaves one final issue. In most settings, procedural review with teeth presents a basic problem: what procedures will the court enforce? To the extent there are specific statutory requirements, this is not an issue. But for the express prohibition, for example, courts could easily enforce the requirements of the NRA.<sup>88</sup> But for collaborative undertakings without a statutory basis (i.e., just about everything else) there are, by definition, no statutory requirements for courts to enforce. Nor is the APA relevant. Most agency decisions arising from collaborative processes count as informal adjudications under the APA, for which there are almost no required procedures.<sup>89</sup> Thus, it would be necessary for courts to develop an administrative common law, not unlike the development of the “paper hearing” in the 1970s. This would be deeply problematic. Most obviously, *Vermont Yankee*<sup>90</sup> stands in the way. There, the Supreme Court made clear that courts lack the authority to develop procedural requirements that are not imposed by the APA, another statute, or the Constitution.<sup>91</sup> The fact that judges think certain procedures are important to fair and sound outcomes is neither here nor there. In addition, the Court’s reasoning is pretty strong in this setting. *Vermont Yankee* asserts that agencies are in a better position than are courts to determine what supplementary procedures will be useful.<sup>92</sup> Courts have little experience with collaborative governance; they may even have a sort of “anti-expertise” if they are drawn toward, and biased in favor of, the adversarial processes with which they are familiar and through which they function.

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While the agency likely has the legal authority to change its mind, it should take the agreement, and its commitments under the agreement, very seriously lest it both develop an immediate political problem for itself: the participants would understandably be irked at spending considerable resources only to have the agency jilt them and others might be reluctant to participate in the future if the agency were to regard their contributions so callously. In short, the agency should have a very good reason for changing its mind and should do so in only very unusual situations.

Philip J. Harter, *Negotiating Government Policy: Better Decisions Through Democratic Synergy*, in *RÉGULATION ÉCONOMIQUE ET DÉMOCRATIE* (Martine Lombard ed., 2006), available at <http://ssrn.com/abstract=912293>, at \*23 (subscription required).

88. Though some significant problems would arise. For example, what proof is permissible or necessary to show consensus? Formal agreement? Or a direct inquiry into what everyone thought? And what level of agreement counts as consensus?

89. Formal adjudications (i.e., those that are required to be conducted on the record after opportunity for a hearing) are subject to full trial-type procedures under sections 554, 556, and 557; formal rulemakings are subject to the basic rulemaking procedures of section 553, with the written comments required by 553(c) replaced by a hearing under sections 556 and 557; informal rulemakings must follow the requirements of section 553. But informal adjudications have no procedural requirements other than the minor and haphazard requirements for all agency actions imposed by section 555. See generally 5 U.S.C. §§ 553-557 (2006).

90. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

91. *Id.* at 543-48.

92. *Id.* at 543-45.



#### IV. OTHER CONSIDERATIONS

##### A. Agency Incentives

The true believer will seek to create incentives to pursue reg-neg. The true believer herself does not need incentives; true belief does the trick. But it will be important to create incentives for those who may view the world differently. One incentive for the agency to pursue reg-neg would be to reduce the amount of scrutiny to which the rule is subject.<sup>93</sup> The agency wants to produce rules with minimum costs and maximum survivability. Whether reg-neg reduces or increases costs, either in the short run or the long, has been the subject of significant empirical debate.<sup>94</sup> But the relevant costs include not only the burdens of the rule-making process itself but also the costs of defending the resulting action.<sup>95</sup> If judicial review is unavailable or perfunctory, then the costs of defense are reduced. More importantly, survivability is increased. One of the expectations for reg-neg was that judicial review would be less common because the obvious challengers would not be unhappy. This hope could be made into a mandate. Again, consider the extreme version: if rules adopted through ordinary notice and comment received traditional judicial scrutiny but those adopted through reg-neg were immune from judicial review, that would be a powerful incentive to pursue the latter procedure.

##### B. Private Parties

Rules about judicial review also affect the incentives for private parties. It is pure speculation, but it seems plausible that if judicial review is limited or unavailable, the negotiating process will be taken more seriously and run more smoothly. Knowing that the negotiation is their one shot, the stakeholders are

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93. David Fontana's *entire* justification for highly deferential review of democracy index rulemaking is that it would create an incentive for agencies to pursue it. Fontana, *supra* note 28.

94. See Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 414, 416 (2001); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1278, 1284, 1309 (1997); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000); Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 195-202 (2005); Siobhan Mee, Comment, *Negotiated Rulemaking and Combined Sewer Overflows (CSOs): Consensus Saves Ossification?*, 25 B.C. ENVTL. AFF. L. REV. 213 (1997).

95. *City of Portland v. U.S. Env'tl. Prot. Agency*, 507 F.3d 706 (D.C. Cir. 2007), was a challenge to an EPA drinking water regulation that began with a negotiated rulemaking. The proposed rule grew out of the negotiation and tracked the stakeholders' suggestions; the final rule diverged. Petitioners argued that EPA had failed to provide adequate notice of what the final rule might include, suggesting that because the proposal had reflected the stakeholder consensus, they had no reason to suspect that meaningful changes might yet be made. In other words, the suggestion was that more detailed notice to let interested parties know their interests were at stake would be required if the proposed rule resulted from a negotiation. The D.C. Circuit flatly rejected the argument, partly because it had no statutory basis, and partly because it would discourage agency use of negotiated rulemaking, contrary to Congress's stated desire to see more of it. *Id.* at 715. Thus, the court was aware that stricter review would in turn mean more burdensome procedures, which would discourage the use of reg-neg. For a similar outcome, also emphasizing the agency's freedom to modify the agreed-upon proposed rule, see *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 859 F.2d 156 (D.C. Cir. 1988).



more likely to choose to participate and to work hard to make the negotiation a success.

[T]he incentive for stakeholders to participate is likely to increase when the collaborative process is the exclusive forum for decision making. In [one instance studied by the authors,] successful collaboration ensued after the court refused to invalidate the [agency action]. This ruling prevented the courts from being used as an alternative venue.<sup>96</sup>

On the other hand, if stakeholders know that judicial review, particularly hard-look review, is available, they might just boycott the whole negotiation and then attack it after the fact. A decade ago, Jody Freeman made this point:

To pursue the promise of collaboration glimpsed in the reg-neg and XL examples above, agencies must presumptively commit to agreements developed in these processes, and courts must presumptively defer to them. If not, participants will never engage in the prolonged negotiation and planning required to produce either a consensus rule or a [Final Project Agreement]. The proliferation of collaborative experiments, absent presumptive deference to the rules or agreements reached, may lead to a frustrating cycle of agency innovation and judicial reversal, which will ultimately amount to little, if any, change.<sup>97</sup>

Alternatively, it may be important to a *successful* process that judicial review be available because it creates incentives for parties to take the proceedings seriously, follow the rules, and try to reach consensus so as to *avoid* judicial review or, more seriously, judicial reversal.

## V. CONCLUSION

The foregoing has been written largely from the perspective of a collaborative governance true believer. That is not because I am one in fact. As I said in the introduction, my own views are disappointingly agnostic. But that approach helps, I hope, to illustrate the issues. I could also have written this article from the point of view of the collaborative governance skeptic. The story would then be turned on its head. Reg-neg would be described as having all the pathologies of the legislative process without the critical saving grace of electoral accountability, amounting to nothing but exactly the sort of delegation to private entities of which courts have always been rightly skeptical. There would be every reason to be concerned about capture, the sacrifice of expertise and facts on the altar of preference and private interest, and incoherent outcomes. On that account, courts would have a critical role in limiting the scope of collaborations to statutorily defined boundaries, and rigorously scrutinizing outcomes on the merits. Ready

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96. Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RESEARCH & THEORY 543, 552 (2008).

97. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 92 (1997); see also Harter, *supra* note 38, at 54.

availability of especially intrusive judicial review could be justified as a *disincentive* for collaborative governance. Indeed, if Congress *really* wanted to discourage reg-neg, it could create the position of Public Advocate in the federal government, and authorize (require?) her to petition for review of any negotiated rule.<sup>98</sup>

The point is that one's view of the appropriate role for the courts depends entirely on one's views about collaborative governance. To date, collaborative governance, especially in the rule-making setting, has been a modest adjustment rather than a fundamental alteration. There has not been a whole-hearted commitment to it. Not surprisingly, then, courts have continued in pretty much the same place with regard to judicial review. If a sort of tinkering at the edges is all we have in mind, then judicial review should continue to look as it has in the past. If we go more boldly down the collaborative governance path, convinced of its merits, then traditional judicial review for anything other than procedural validity would be out of place.

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98. Cf. N.J. STAT. ANN. § 52:27EE-59(b) (West, Westlaw current through L. 2009, c. 167, and J.R. No. 11) ("The Division of Public Interest Advocacy [within the Office of the New Jersey Public Advocate] may represent and protect the public interest by . . . instituting litigation on behalf of a broad public interest when authorized to do so by the Public Advocate.").